In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ——. Original.

EX PARTE THE UNITED STATES, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The petitioner in the above-entitled matter respectfully asks the court for leave to file the petition presented herewith, wherein it asks for a writ of mandamus, directed to the Hon. Francis J. Wing, judge, and H. F. Carleton, clerk, of the United States district court for the northern district of Ohio, commanding said judge to direct the entry upon the records of that court of final judgments in the causes of *The United States* v. *Jock Coe*, *The United States* v. *Bong Meng*, and *The United States* v. *Woo Joe*, and said clerk to enter the same; and further commanding said judge and clerk to file all papers relating to said causes and treat them in all respects as properly appealed from the United States commissioners to the district court, and as having been before said court for determination.

THE UNITED STATES,
By P. C. KNOX,
Attorney-General.

22923—04——1

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ——. Original.

EX PARTE THE UNITED STATES, PETITIONER.

PETITION FOR MANDAMUS.

Your petitioner, The United States, respectfully represents as follows:

1. On October 3, 1903, affidavit was made before John H. Simpson, a United States commissioner for the northern district of Ohio, stating that one Jock Coe, a Chinese person, was at Cleveland, Ohio, within the United States, contrary to law. On the same day a warrant was issued commanding the marshal to apprehend Jock Coe and forthwith bring him before said commissioner, and he was likewise ordered to summon Thomas P. H. O'Neill as a witness. The warrant for arrest was immediately executed and proper return made thereon. On October 3, 7, and 14 writs of mittimus were addressed to the jailer of Cuyahoga County, Ohio. On October 26 the commissioner, having tried the case, issued a writ reciting that the defendant had been found

guilty as charged, and directing the marshal to deport him. He likewise prepared a transcript of the proceedings before him showing the action taken, including final judgment of deportation, which he indorsed thus:

> NORTHERN DISTRICT OF OHIO, *ss:*
>
> I, the undersigned, a United States commissioner for said district, do hereby certify that the within is a full and true transcript of the proceedings had by and before me in the above-named cause, and of the costs therein, as recorded in my docket 1, page 44; and that the papers numbered one to 8, inclusive, accompanying this transcript, are the original papers in said cause; all of which are herewith transmitted into the district court of the United States within and for said district.
>
> Witness my hand on this 26th day of October, 1903.
>
> JOHN H. SIMPSON,
> *U. S. Commissioner, as aforesaid.*

Notice of appeal, dated October 31, 1903, "from the finding and order" of the commissioner "to the district court of the United States in and for the northern district of Ohio and to the judge of said court," was addressed to the United States attorney, United States commissioner, clerk of the district court, and marshal.

The transcript of the proceedings before the United States commissioner was lodged with the clerk of the district court for the northern district

of Ohio, eastern division, and by him stamped, "Filed, Nov. 2, 1903, at —— o'clock —— m. H. F. Carleton, clerk," and the cause seems to have been given a number on the docket of the district court.

By a paper of November 6, 1903, entitled "Before Hon. F. J. Wing, judge of the United States district court for the northern district of Ohio," counsel entered objection to the introduction of any evidence under the charge against the defendant upon the ground that the act upon which the prosecution was based was unconstitutional and void. This paper is stamped "Filed Nov. 6, 1903, at —— o'clock —— m. H. F. Carleton, clerk." By an order of November 7, 1903, signed "Francis J. Wing, judge U. S. Dist. Ct., N. D. O.," hearing of the cause was postponed until November 13. A summons for M. M. Curtiss as a witness was issued November 25 by the clerk of the court and is stamped "Filed Nov. 28, 1903, at —— o'clock —— m. H. F. Carleton, clerk." Thereafter, as appears in the bill of exceptions, the objection and demurrer dated November 6, 1903, was sustained by Judge Wing upon the ground that section 13 of the act of Congress of September 13, 1888 (25 Stat., 476, c. 1015), was unconstitutional and void and the defendant was thereupon discharged, to which action due exception was taken. Motion for a new trial was made and overruled. A bill of exceptions reciting all the proceedings, together with the opinion of the judge, was duly settled and signed by him.

The district attorney of the United States, after the discharge of the defendant as above shown, applied to the clerk of the district court to file all the above-described papers as a part of the record of the court, and to prepare a certified transcript thereof. This the clerk, claiming to act under the advice and instruction of Hon. Francis J. Wing, declined to do. He stated, furthermore, that so many of the papers as were marked "Filed" were so marked by mistake. Thereupon the petitioner, through its attorney aforesaid, presented to Judge Wing a request in writing for an order directing the clerk to file in the district court all papers in the proceedings and make all necessary entries in regard thereto, and to prepare a certified transcript thereof, in order that a complete record of the same might be preserved and an appeal taken to this honorable court. This request was refused, the judge maintaining that the proceedings before him on appeal from the United States commissioner had been before him as judge and not before the district court, and that none of the papers showing the proceedings should be filed by the clerk.

Copies of all the above-mentioned papers are hereto attached.

2. On October 3, 1903, a Chinese person known as Bong Meng, under a warrant issued by John H. Simpson, a United States commissioner for the northern district of Ohio, was arrested and afterwards by him ordered deported. An appeal was

taken October 31, 1903, "from said finding and order of the district court of the United States in and for the northern district of Ohio and to the judge of said court," and proceedings in all respects similar to those above described in the case of *The United States* v. *Jock Coe* were had, and the results thereof were the same.

On January 16, 1904, a Chinese person known as Woo Joe, under a warrant issued by Bernard F. Brough, a United States commissioner in and for the northern district of Ohio, western division, was arrested and afterwards by him ordered deported. An appeal was taken February 25, 1904, "from said finding and order of the district court of the United States for the northern district of Ohio, and to the judge of said court," and proceedings in all respects similar to those hereinbefore described in the causes of *The United States* v. *Jock Coe* and *The United States* v. *Bong Meng* were had, and the result thereof was the same.

The papers mentioned in the two cases last referred to have not been printed, and so to do would only incumber the record. They are in all substantial particulars the same as those which are hereto annexed. The minor differences—principally in names and dates and in the number of the same which are marked "Filed" by the stamp of the clerk—are not thought to be important.

3. Since the action of Judge Wing in the foregoing causes, petitioner is advised that the United

States commissioners in and for the northern district of Ohio have felt themselves bound by the opinion holding section 13 of the act of September 13, 1888, unconstitutional, and have, for that reason, contrary to their former practice, discharged certain Chinese persons brought before them charged with being unlawfully in the United States.

Manifestly, in the present condition of affairs, it is impossible for the Government to secure deportation of Chinamen found unlawfully within the northern district of Ohio, and this unfortunate situation seems likely to continue so long as Judge Wing presides there and adheres to the views which he has heretofore expressed. It is further manifest that the action of said judge in refusing to order the sundry papers, showing the proceedings in the causes above referred to to be properly filed in the clerk's office, so as to form a part of the records thereof, makes it impossible for the Government to remove the causes into this court in the usual and orderly way, as it is advised it has a right to do.

For fifteen years Chinese persons have been deported from the United States under the provisions of the law which the honorable judge in the northern district of Ohio now holds to be unconstitutional, and many causes involving its enforcement have been tried in this court, where its provisions have been upheld.

In *Wong Wing* v. *United States* (163 U. S., 228), decided in May, 1896, the constitutionality of the act of September 13, 1888, was drawn in question, and it was held to be valid.

In the case of *Chin Bak Kan* v. *United States* (186 U. S., 193), proceedings for the deportation of a Chinaman were begun before a commissioner. An appeal was taken from his decision to the district court, and from its final order to the Supreme Court of the United States. A claim of citizenship was set up by the Chinaman and the jurisdiction of the commissioner challenged. The court sustained the law and affirmed the action of the district court in ordering deportation.

In the recent cases of *Ah How and others* v. *The United States*, decided February 23, 1904—opinion by Justice Holmes—the judgment of the district court for the eastern district of New York, affirming the action of a United States commissioner who ordered deportation of Chinese persons under proceedings in all respects similar to those begun in the northern district of Ohio in the causes now under consideration, was affirmed, a result entirely out of harmony with the view that the act of 1888 is unconstitutional, or that the proceedings upon appeal from a commissioner are to the judge and not to the district court.

Wherefore your petitioner prays that a writ of mandamus may be issued out of this court to the Hon. Francis J. Wing, judge, and H. F. Carleton,

clerk, of the district court of the United States for the northern district of Ohio, eastern division, commanding said judge to direct the entry upon the records of that court of final judgments in the above-entitled causes of *United States* v. *Jock Coe*, *United States* v. *Bong Meng*, and *United States* v. *Woo Joe*, and said clerk to enter the same; and further commanding said judge and clerk to file all of the hereinbefore-described papers relating to said causes and to treat them in all respects as properly appealed from the United States commissioners to the district court of the United States for the northern district of Ohio, eastern division, and as having been before said court for determination.

THE UNITED STATES,
By P. C. KNOX,
Attorney-General.
JOHN J. SULLIVAN,
United States Attorney for the Northern District of Ohio.

STATE OF OHIO,
County of Cuyahoga, ss:

Personally appeared before me, the undersigned officer authorized to administer oaths, John J. Sullivan, who, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and that the same are true, to the best of his knowledge, information, and belief. And he further says that he is the United States district attorney for the northern district of

Ohio, and is authorized under the law and under the direction of the Department of Justice to sign the foregoing petition.

JOHN J. SULLIVAN.

Subscribed and sworn to before me this 10th day of March, 1904.

[SEAL.] EDWIN DRAKE,
Notary Public in and for the County of Cuyahoga, State of Ohio.

THE STATE OF OHIO,
Cuyahoga County, ss:

I, Charles P. Salen, clerk of the court of common pleas, a court of record of Cuyahoga County aforesaid, do hereby certify that Edwin Drake, before whom the annexed affidavit was taken, was at the date thereof a notary public in and for said county, duly authorized by the laws of Ohio to take the same, also to take acknowledgments and proofs of deeds or conveyances for land, tenements, or hereditaments situated and lying in said State of Ohio; and further, that I am well acquainted with his handwriting and believe his signature thereto is genuine, and that the annexed instrument is executed according to the laws of the State of Ohio.

Commission expires May 22, 1904.

In testimony whereof I hereunto subscribed my name and affix the seal of said court, at Cleveland this 10th day of March, A. D. 1904.

[SEAL.] CHAS. P. SALEN, *Clerk.*

No. 1499.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. ——, Original.

EX PARTE THE UNITED STATES, PETITIONER.

ON PETITION FOR WRIT OF MANDAMUS.

EXHIBITS.

UNITED STATES OF AMERICA,
Northern District of Ohio ss.

Before me John H. Simpson, a United States Commissioner for the Northern District of Ohio, personally appeared this day Thomas P. H.O'Neill who being first duly sworn, deposes and says that on or about the 3″ day of October, A. D. 1903, at Cleveland, Cuyahoga County, Ohio, in said District, Jock Coe, in violation of Section 12 of the Act of July 5, 1884, of the Revised Statutes of the United States, was, being a Chinese person, found unlawfully within the boundaries of the United States of America; against the peace and dignity of the United States; and contrary to the form of the statute in such case made and provided.

Deponent further says that he has reason to believe and does believe that Thomas P. H. O'Neill, ——— ——— are material witnesses to the subject matter of this complaint.

(Deponent's signature) THOMAS P. H. O'NEILL.

Sworn to before me, and subscribed in my presence, this 3″ day of October, A. D. 1903.

JOHN H. SIMPSON
United States Commissioner as aforesaid.

The President of the United States of America, to the Marshal of the United States for the Northern District of Ohio and to his Deputies, or any or either of them:

Whereas, Thomas P. H. O'Neill has made complaint in writing under oath before me, the undersigned, a United States Commissioner for the Northern District of Ohio charging that Jock Coe late of Cleveland, Cuyahoga County, in the State of Ohio was, on or about the 3″ day of October, A. D. 1903, at Cleveland in said District, in violation of Section 12 of the act of July 5, 1884 of the Revised Statutes of the United States, being a Chinese person, found unlawfully within the boundaries of the United States; against the peace and dignity of the United States; and contrary to the form of the Statute in such case made and provided.

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said ——— wherever found in your District and bring his body forthwith before me or any other Commissioner having jurisdiction of said matter, to answer the said

complaint, that he may then and there be dealt with according to law for the said offense.

Given under my hand and seal this 3″ day of October A. D. 1903.

JOHN H. SIMPSON,
United States Commissioner as aforesaid.

Approved,

———— ————,
United States Attorney.

[Indorsed.]

Return.

Received this warrant on the 3d day of Oct 1903 at Cleveland and executed the same by arresting the within-named Jock Coe at Cleveland on the 3d day of Oct., 1903, and have his body now in court, as within I am commanded.

F. M. CHANDLER,
U. S. Marshal.

Per F. M. FANNING,
Deputy.

3d day of Oct., 1903.

Service	2.00	
Fares	.06	
" s. & p	.20	
Attendance	2.00	Oct 7.
" Sampsell	2.00	

UNITED STATES OF AMERICA,
Northern District of Ohio ss.

The President of the United States of America, to the Marshal of the Northern District of Ohio Greeting:

You are hereby commanded to summon Thomas P. H. O'Neill if he be found in your bailiwick, to be and appear before me, John H. Simpson a United States Commissioner for the Northern District of Ohio aforesaid, at my office Federal Bldg. Cleveland on the 7″ day of Oct, 1903, at 8:30 o'clock A M., to give testimony, and the truth to say, in a cause pending before me, wherein the United States is complainant, and ——— defendant.

In behalf of United States

Hereof fail not, under the penalty of the law, and have you then and there this writ.

Given under my hand, this 3 day of Oct, A. D. 1903.

JOHN H. SIMPSON,
United States Commissioner as aforesaid.

[Indorsed.]

Marshal's return.

(On original writ only.)

Received this writ Oct 3, 1903, and on or before Oct 7, 1903, served the same on the within named Thos P H O'Neil by leaving a certified copy thereof with each of them personally; and on the within named ——— by leaving such copy at the usual place of residence of each of them. The other person— within named not found.

Marshal's fees and costs on this writ $56.

F. M. CHANDLER, *U. S. Marshal.*
By F. M. FANNING, *Deputy.*

UNITED STATES OF AMERICA,
Northern District of Ohio ss.

The President of the United States of America, to the Keeper of the Jail of Cuyahoga County in the State of Ohio Greeting:

Whereas, Jock Coe has been arrested upon the oath of Thomas P. H. O'Neill for having, on or about the 3 day of Oct A. D. 1903 at Cleveland in the District aforesaid, in violation of Section 12 of the Act of July 5, 1884 of the Revised Statutes of the United States, being a Chinese person, been unlawfully found within the boundaries of the United States; against the peace and dignity of the United States; and contrary to the form of the statute in such case made and provided and ha not been examined by me, John H. Simpson a United States Commissioner for said northern District of Ohio upon the aforesaid charge, and ha been required to appear before me, on the 7 day of Oct A. D. 1903, at 8:30 o'clock a m., of said day, which requisition he ha failed to comply with:

These are therefore to command you, in the name and by the authority aforesaid, to receive the said ——— prisoner of the United States of America, in the Jail of said Cuyahoga County, there to remain until he be discharged by due course of law.

Given under my hand and seal in the City and District aforesaid, this 3 day of Oct, A. D. 1903

JOHN H. SIMPSON,
United States Commissioner as aforesaid.

22923—04——2

[Indorsed.]

Return.

Received this mittimus with the within named prisoner, on the 3d day of October, A. D. 1903, and on the same day I committed the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus.

Dated Oct. 3, 1903.

F. M. CHANDLER,
United States Marshal No. District of Ohio.
By F. M. FANNING,
Deputy.

Temp. mitt ..... .50
Travel ..... .20
.70

UNITED STATES OF AMERICA,
Northern District of Ohio, ss.

The President of the United States of America, to the Keeper of the Jail of Cuyahoga County, in the State of Ohio, Greeting:

Whereas, Jock Coe has been arrested upon the oath of Thos. P. H. O'Neill for having, on or about the 3 day of Oct., A. D. 1903, at Cleveland in the District aforesaid, in violation of Section — of the Revised Statutes of the United States, being a Chinese person, been found unlawfully within the boundaries of the United States; against, &c., and has not been examined by me, John H. Simpson, a United States Commissioner for said Northern District of Ohio, upon the aforesaid charge, and has been required to give bail in the sum of Twenty-five Hundred no/100 Dollars

for his appearance before me, on the 26″ day of Oct., A. D. 1903, at 2.00 o'clock P. M. of said day, which requisition he has failed to comply with.

These are therefore to command you, in the name and by the authority aforesaid, to receive the said Jock Coe prisoner of the United States of America, in the Jail of said Cuyahoga County, there to remain until he be discharged by due course of law.

Given under my hand and seal, in the City and District aforesaid, this 14 day of Oct., A. D. 1903.

JOHN H. SIMPSON,
United States Commissioner as aforesaid.

[Indorsed.]

Return.

(To be made on the original writ only.)

Received this mittimus with the within-named prisoner, on the 14 day of Oct., A. D. 1903, and on the same day. I committed the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus.

Dated Oct. 14, 1903.

F. M. CHANDLER,
United States Marshal N. District of O.
By F. M. FANNING, *Deputy.*

Service	.50
Travel S. & P	.20
Attendance	2.00
	2.70

UNITED STATES OF AMERICA,
Northern District of Ohio ss.

The President of the United Slates of America, to the Keeper of the Jail of Cuyahoga County in the State of Ohio greeting:

Whereas, Jock Coe has heen arrested upon the oath of Thos. H. P. O'Neill for having, on or about the 3″ day of October A. D. 1903 at Cleveland, Ohio, in the District aforesaid, in violation of Section 12 of the Act of July 5, 1884 of the Revised Statutes of the United States, being a Chinese person, been found unlawfully within the boundaries of the United States of America; against the peace and dignity of the United States; and contrary to the form of the statute in such case made and provided, and has not been examined by me, John H. Simpson a United States Commissioner for said Northern District of Ohio upon the aforesaid charge, and has been required to appear before me, on the 14″ day of October A. D. 1903, at 11:00 o'clock A. M., of said day, which requisition he ha failed to comply with:

These are therefore to command you, in the name and by the authority aforesaid, to receive the said Jock Coe prisoner of the United States of America, in the Jail of said Cuyahoga County, there to remain until he be discharged by due course of law.

Given under my hand and seal in the City and District aforesaid, this 7″ day of October, A. D. 1903

JOHN H. SIMPSON,
United States Commissioner as aforesaid.

[Indorsed.]

Return.

Received this mittimus with the within named Prisoner , on the 7th day of October A. D. 1903, and on the same day I committed the said Prisoner to the custody of the Jail Keeper named in said Mittimus, with whom I left at the same time a certified copy of this Mittimus.

Dated Oct 7 190

F. M. CHANDLER
United States Marshal, No. District of Ohio.
By F. M. FANNING
Deputy.

Mitt ..... .50
Travel ..... .20
.70

UNITED STATES OF AMERICA,
Northern District of Ohio, ss:

The President of the United States of America to the marshal of the northern district of Ohio, and to the keeper of the jail of Cuyahoga County in the State of Ohio, greeting:

Whereas Jock Coe has been arrested upon the oath of Thomas P. H. O'Neill for having, on or about the 3 day of Oct., 1903, in said district, in violation of section — of the Revised Statutes of the United States, being a Chinese person, been found unlawfully within the boundaries of the United States, against, &c.

And, after an examination being this day had by me, it appearing to me that said offense had been committed, and probable cause being shown to believe said Jock Coe committed said offense as charged, I have directed that said Jock Coe

committed to the keeping of the United States marshal for the northern district of Ohio to be deported to China.

Now, these are therefore, in the name and by the authority aforesaid, to command you, the said marshal, to commit the said Jock Coe to the custody of the keeper of said jail of Cuyahoga County and to leave with said jailer a certified copy of this writ; and to command you, the keeper of said jail of said county, to receive the said Jock Coe, prisoner of the United States of America, into your custody, in said jail, and him there safely to keep until he be deported.

In witness whereof I have hereto set my hand and seal at my office, in said district, this 26 day of Oct., A. D. 1903.

JOHN H. SIMPSON,
United States Commissioner
for said Northern District of Ohio.

[Indorsed.]

Return.

(To be made on the original writ only.)

Received this mittimus with the within-named prisoner, on the 26 day of Oct., A. D. 1903, and on the same day I committed the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus.

Dated Oct. 26, 1903.

F. M. CHANDLER,
United States Marshal N. District of Ohio.
By F. M. FANNING, *Deputy.*

Committing	.50
Travel s. & p	.20
Attendance	2.00
	$2.70

UNITED STATES OF AMERICA
vs.
JOCK COE DEFENDANT. } No. 23

UNITED STATES OF AMERICA,
Northern District of Ohio ss.

Before me, John H. Simpson a United States Commissioner for said District, complaint and affidavit was made on this 3d day of Oct 1903, by Thomas P. H. O'Neill charging in substance that on or about the 3d day of Oct 1903, at Cleveland in said District, the defendant, Jock Coe in violation of Section 12 of the Act of July 5, 1884 of the Revised Statutes of the United States, being a Chinese person, was found unlawfully within the boundaries of the United States.

Complaint approved by U. S. District Attorney on ——— 19—.

On Oct 3 1903, issued warrant to F. M. Chandler U. S. Marshal, returnable before me.

On Oct 26 1903, warrant returned, indorsed in substance as follows: Recd Oct 3, 1903 and same day arrested deft. at Cleveland and have body in court, F. M. Chandler, U. S. Marshal, Per F. M. Fanning, Deputy.

On Oct 3 1903, issued subpena for the following witnesses in behalf of U. S.: Thomas P. H. O'Neill.

On Oct 7 1903, said subpena was returned, indorsed in substance as follows: Recd. Oct 3, 1903 and on or before Oct 7, 1903 served same Thomas P. H. O'Neill by leaving with him personally a true copy thereof, F. M. Chandler, U. S. Marshal By F. M. Fanning, Deputy. Fees 56c.

On ——— 19—, issued subpena for the following witnesses in behalf of U. S.: ———

On ——— 19—, said subpena was returned, indorsed in substance as follows: ———

On Oct 3 1903, issued temporary mittimus committing defendant to the jail of Cuyahoga county Ohio pending examination.

On Oct 3 1903, temporary mittimus returned, indorsed in substance as follows: Recd. Oct 3, 1903 and same day committed prisoner to jail keeper named with whom I left certified copy hereof, Oct 3, 1903, F. M. Chandler, U. S. Marshal, North. Dist. of Ohio By F. M. Fanning, Deputy. Fees 70c.

On Oct 7 1903, defendant was brought before me, the said Commissioner, at my office, in the City of Cleveland in said District, by F. M. Fanning Deputy U. S. Marshal; and the complaint was then and there fully read and explained to the said defendant, who thereupon, for plea, said he is "not guilty" as charged in the said complaint.

And thereupon, in preliminary trial to determine whether there exists probable ground to believe said defendant guilty as charged, the following witnesses were sworn and examined on the part of the plaintiff ——— ———.

And thereupon, on motion to that effect, made by the defendant, this hearing was continued until the 14th day of Oct 1903, and said defendant was required to give bond, pending examination, in the sum of ——— dollars, which he did —— do.

On Oct 7 1903, issued temporary mittimus committing defendant to the jail of Cuyahoga County, Ohio pending examination.

On Oct 7 1903, said mittimus was returned, indorsed in substance as follows: "Received this mittimus with the within named prisoner, on the 7th day of Oct 1903, and on the same day I com-

mitted the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus.

F. M. Chandler U. S. Marshal, Northern District of Ohio By F. M. Chandler, Deputy." Fees 70c.

*See below.

On Oct 26 1903, pursuant to the continuance of 14 1903, defendant was brought before me, the said Commissioner, at my said office, in said district, by F. M. Fanning Deputy U. S. Marshal; and, the defendant being present, the following witnesses were sworn and examined on the part of the Plaintiff S. F. Moy.

And, from the evidence of the said witnesses, it appearing to me, the Commissioner, that the laws of the United States have been violated, as charged in the complaint, and that there is —— probable cause shown to believe the defendant guilty of the alleged offense, it was ordered that he be deported to China as appears more fully in my order findings and judgment attached hereto, marked Exhibit A, and made part hereof.

And the following witnesses were recognized to appear at said term of court ——— ———.

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*On Oct. 14, 1903, pursuant to continuance of Oct. 7, 1903, defendant was brought before me the said commissioner at my said office in said district by F. M. Fanning, deputy U. S. marshal.

And thereupon, upon motion to that effect made by defendant, this hearing was continued until the 26th day of October, A. D., 1903, and said defendant was required to give bond, pending examination, in sum of $2,500.00, which he did not do.

On Oct. 14, 1903, in default of said bond, issued temporary mittimus, committing defendant to jail of Cuyahoga County, Ohio, pending examination.

On Oct. 14, 1903, said mittimus was returned indorsed in substance as follows: Recd. Oct. 14, 1903, with the within-named prisoner, and same day committed prisoner to custody of jail keeper named, with whom I left certified copy hereof. F. M. Chandler, U. S. marshal, northern district of Ohio. By F. M. Fanning, deputy. Fees, $2.70.

And the defendant, committed to the jail of Cuyahoga County, Ohio there to remain until deported, as further evidenced by the return on said mittimus, which is in substance as follows: "Received this mittimus with the within named prisoner, on the 26th day of Oct 1903, and on the same day I committed the said prisoner to the custody of the jail keeper named in said mittimus, with whom I left at the same time a certified copy of this mittimus F. M. Chandler, U. S. Marshal, Northern District of Ohio By F. M. Fanning, Deputy."

And thereupon the said defendant gave bond in the said sum of ——— dollars for his appearance at the said time and place, with ———

Oct. 31, 1903 Deft. filed notice of appeal, which is filed herewith.

On ——— 19—, said ——— applied for discharge under section 1042 U. S. Rev. Stat.; and on hearing of said application and the testimony produced, said ——— was ——— discharged accordingly.

Witnesses in above case:

S. F. Moy, Buffalo, New York, Official Interpreter.

Thomas P. H. O'Neill, Cleveland, Ohio, Chinese Inspector.

Fees of U. S. Commissioner.

(See Act of May 28, 1896.)

	$ cts.
Drawing complaint, with oath and jurat to same, 50c..	50
Copy of complaint, with certificate to same, 30c	
Issuing warrant of arrest, 75c.; Ent. return, 15c	90
Issuing subpena or subpenas in said case, 25c.; with 5c. for each of.....witnesses in addition to the first,.....cts.; Entering return, 15c.....	40

	$ cts.
Drawing temporary bond of defendant and sureties, taking acknowledgment of same and justification of sureties, 75c	
Issuing temporary commitment and making copy of same, $1.00; Entering return, 15c	1 15
Same	1 15
Same	1 15
Administering oaths to 1 U. S. witnesses on trial, 10c. each	10
Hearing and deciding on criminal charges on the 7 day of Oct 1903, and reducing the testimony to writing when required by law or order of court, per diem, $5.00	5 00
Same Oct. 14, 1903	
Same, for one additional day on the 26th day of Oct 1903, because the hearing could not be completed in one day, per diem, $5.00	5 00
Drawing bond of defendant and sureties, taking acknowledgment of same, and justification of sureties, 75c	
Issuing commitment and making copy of same, $1.00; Entering return, 15c	1 15
Recognizance of all witnesses in the case, defendant being held for court, 50c	
Oath to.....U. S. witnesses as to attendance and travel, 5c. each	
Order, in duplicate, to pay first witness on behalf U. S., 30c., and 5c. for each of.....additional U. S. witnesses,.....cts	
Transcript of proceedings, required by order of court, and transmission of papers to co'rt, 60c	60
Copy of warrant of arrest, with certificate to same, when defendant is held for court and original papers are not sent to court, 40c	
Examination and certificate in cases of application for discharge of poor convict (under §1042 R. S.), and all services connected therewith in case vs....$3.00	
	17 10

EXHIBIT A.—*John H. Simpson U. S. Commr*

United States of America Northern District of Ohio:

Before John H. Simpson, United States commissioner for the northern district of Ohio:

THE UNITED STATES
against
JOCK COE

Whereas, Jock Coe stands charged on oath before me, John H. Simpson, a Commissioner duly authorized and empowered by the District Court of the United States in and for the Northern District of Ohio, to execute all the powers and perform all the duties conferred, required or authorized by any Act of Congress now in force, or which may hereafter be passed as follows, to-wit:

That within the jurisdiction of the United States aforesaid and of this Honorable Court, and after the passage by the Congress of the United States of an Act entitled "An Act to prohibit the coming of Chinese laborers to the United States." (Approved September 13, 1888.)

He, the said Jock Coe did come into the United States from a foreign place, and having come, has remained within the United States; that the said Jock Coe has been found, and now is unlawfully within the United States, and that at all the times herein mentioned, the said Jock Coe is, and was a Chinese laborer; and

Whereas, the said Jock Coe was duly apprehended upon said charge in the Northern District of Ohio; and

Whereas, an examination was thereupon had by me of said Jock Coe upon the said charge, from

which examination and from the evidence adduced before me, it appears to me that the said Jock Coe is by race, language, color and dress, a Chinese person, and a laborer by occupation; and

Whereas, said Jock Coe has failed to establish, by affirmative proof to my satisfaction, his lawful right to remain in the United States; and

Whereas, said Jock Coe has not made it appear to me that he is a subject or a citizen of any other country than China; and

Whereas, from the foregoing facts, I find and adjudge said Jock Coe to be unlawfully within the United States:

Now, therefore, I order that said Jock Coe be removed from the United States to China, and I further order that said Jock Coe be, and he is hereby committed to the United States Marshal for the Northern District of Ohio for the purpose aforesaid.

Cleveland, Ohio, October 26 1903.

JOHN H. SIMPSON
Commissioner of U. S. District Court
for the Northern District of Ohio.

[Indorsed.]

2982

Form 9.

U. S. Commissioner's Transcript.

THE UNITED STATES OF AMERICA
vs.
JOCK COE

Transcript of proceedings

Before John H. Simpson United States Commissioner for the Northern Dist. of Ohio.

Certificate.

THE UNITED STATES OF AMERICA,
Northern District of Ohio ss.

I, the undersigned, a United States Commissioner for said District, do hereby certify that the within is a full and true Transcript of the proceedings had by and before me in the above-named cause, and of the costs therein, as recorded in my docket 1, page 44; and that the papers numbered one to 8 inclusive, accompanying this transcript, are the original papers in said cause; all of which are herewith transmitted into the District Court of the United States, within and for said District.

Witness my hand on this 26th day of October 1903.

JOHN H. SIMPSON
U. S. Commissioner as aforesaid.

Returned into court and filed this —— day of ——— 19—.

Filed Nov 2 1903 at —— o'clock —— m. H. F. Carleton, Clerk.

The United States of America, Northern District of Ohio.

Before John H. Simpson, United States Commissioner for the Northern District of Ohio.

THE UNITED STATES,
vs
JOCK COE, DEFT. } Notice of appeal.

To Honorable John J. Sullivan, U. S. District Attorney, John H. Simpson, U. S. Commissioner, W. F. Carleton, Clerk of the U. S. District Court and F. M. Chandler U. S. Marshall, all in and for the Northern District of Ohio.

You will please take notice that Jock Coe, charged and examined by and before John H.

Simpson United States Commissioner in and for the Northern District of Ohio, and by him under the complaint therein, on the 26th day of October, A. D. 1903, found and adjudged guilty of being unlawfully within the United States and ordered deported therefrom to the Empire of China, hereby appeals from said finding and order to the District Court of the United States in and for the Northern District of Ohio, and to the Judge of said Court.

You will further take notice that said appeal is taken on questions of both law and fact.

Dated October 31, 1903.

VESSY DAVIS & MANAK,
Attorneys for Defendant.

STATE OF OHIO,
Cuyahoga County, ss.

Before Hon. F. J. Wing, Judge of the United States District Court for the Northern District of Ohio.

THE UNITED STATES OF AMERICA, PLFF.
vs.
CHICK CHONG, DEFT.

The defendant objects to the introduction of any evidence under the charge herein on the ground that said act upon which said prosecution is based is unconstitutional and void in this to wit:

That said act is in contravention of Article III, Section 2 of the Constitution of the United States; also that said act is in contravention of Article VI of said Constitution.

CHICK CHONG
By VESSY DAVIS & MANAK
his Attys.

[Indorsed.]

THE UNITED STATES
vs.
CHICK CHONG ALIAS JOCK COE. } 2982.

Demurrer.

Filed Nov. 6, 1903, at —— o'clock —— M. H. F. Carleton, Clerk.

VESSY DAVIS & MANAK
his Attys.

THE UNITED STATES,
vs.
JOCK COE. } No. 2982. Law.

This day came the United States Attorney on behalf of the United States, and came also Jock Coe at the bar of Court, and this cause came on to be heard upon an Appeal from the United States Commissioner's Decision ordering that said Jock Coe be deported, and upon application of the United States Attorney, and for good cause shown, further proceedings in this cause are postponed until Friday, November 13th, 1903, at ten o'clock A. M.

It is thereupon ordered that said Jock Coe enter into a recognizance in the sum of $200 for his appearance here in this Court from day to day during the present term, and from term to term thereafter, and thereupon said Jock Coe as principal and Frank Manak as surety entered into the required recognizance.

"O. K." FRANCIS J. WING,
Judg. U. S. Dist. Ct., N. D. O.

November 7th, 1903.

[Indorsed.]

THE UNITED STATES, *vs.* JOCK COE. } 2982.

Order.

Form No. 145.

Præcipe for subpœna in a case.

In the District Court, United States, Northern District of Ohio.

THE UNITED STATES *vs.* JOCK COE. } No. 2982.

The Cierk of said Court will issue Subpœna for the following-named persons to appear before said Court, at the United States Court Rooms, in Cleveland, O., at 10.30 o'clock, A. M., on the 27th day of November, 1903, then and there to testify in behalf of the United States.

Names: Professor M. M. Curtis, 43 Adelbert St.

This 25th day of November, 1903.

JOHN J. SULLIVAN,
U. S. Attorney.

(See Sec. 829, R. S. U. S.)

[Indorsed.]

United States District Court N. District of Ohio, October Term, 1903.

THE UNITED STATES
vs.
JOCK COE. } 2982.

Filed Nov. 25, 1903, at —— o'clock —— M. H. F. Carleton, clerk.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss.

The President of the United States of America to Professor M. M. Curtis, 43 Adelbert st.

You are hereby commanded that, laying aside all and singular your business and excuses, you be and appear in the district court of the United States for the northern district of Ohio at the court-house in the city of Cleveland, in said district, on the 27th day of November, A. D. 1903, at 10.30 o'clock a. m. of said day, then and there to testify and give evidence on behalf of the United States, and not to depart the court without leave thereof or of the district attorney.

Hereof fail not, under penalty of what may befall you thereon.

Witness, the Honorable Francis J. Wing, judge of the said district court of the United States, this 25th day of November, A. D. 1903, and in the 128th year of the Independence of the United States.

[SEAL.] H. F. CARLETON, *Clerk*,
By F. J. DENZLER, *Deputy Clerk*.

[Indorsed.]

U. S. Marshal's No. 985.

No. 2982. District court of the United States for the northern district of Ohio.

United States subpœna.

THE UNITED STATES
vs.
JOCK COE.

Returnable November 27th, 1903.

Returned and filed.

Filed Nov. 28, 1903, at —— o'clock, —— m.

H. F. Carleton, clerk.

John J. Sullivan, U. S. Attorney.

U. S. Marshal's return.

THE UNITED STATES OF AMERICA,
Northern District of Ohio, ss.

Received this writ at Cleveland, Ohio, on Nov. 25th, 1903, and on the same day and place I served the same by delivering a true and certified copy hereof with all endorsements thereon to the within-named Professor M. M. Curtis, personally.

F. M. CHANDLER, *U. S. Marshal,*
By F. M. FANING, *Deputy.*

Fees.

Service	$0.50
Travel	.24
Total	$0.74

The United States of America, Northern District of Ohio, eastern division, *ss.*

Before Francis J. Wing, U. S. District Judge.

THE UNITED STATES OF AMERICA, plaintiff, *v.* JOCK COE, DEFENDANT.	Bill of exceptions.

Be it remembered, That on the 27th day of November, 1903, before me, Francis J. Wing, Judge of the District Court of the United States for the Northern District of Ohio, this cause, on appeal from the order and judgment of John H. Simpson, United States Commissioner for said District, came on regularly for trial, Messrs. Vessey, Davis & Manak appearing for the defendant, and John J. Sullivan, United States Attorney for said District, appearing on behalf of the United States, whereupon the record on said appeal showed and proved the following facts, to-wit:—

On the third day of October, 1903, a complaint was duly sworn to and verified by one Thomas P. H. O'Neill before said John H. Simpson, United States Commissioner, alleging that said defendant was a Chinese person, and did, on the third day of October, 1903, come into the United States from a foreign place, and was unlawfully within the United States, contrary to the form of the statutes of the United States in such case made and provided, and against the peace and dignity of the said United States.

That thereupon, a warrant in due form was issued by said Commissioner for the arrest of said defendant, commanding the Marshal of said District to bring him forthwith before said Commissioner.

That said Marshal, pursuant to said warrant, arrested the defendant herein on the third day of October, 1903, and brought him before said Commissioner.

That on the 26th day of October, 1903, a trial of said defendant upon said complaint was had before said Commissioner at his office in the City of Cleveland, State of Ohio, John J. Sullivan, United States Attorney, appearing on behalf of the United States, and Messrs. Vessey, Davis & Manak appearing on behalf of the defendant, whereupon witnesses on behalf of the United States were examined and testified, and the cause submitted to the Commissioner for his decision.

That on the 26th day of October, 1903, the said Commissioner gave, made and filed, in writing, his findings, order and judgment in said cause, wherein and whereby said Commissioner did expressly find that at the time of filing said complaint, and of the rendition of said judgment, said defendant was, by race, language, color and dress, a Chinese person, and that said defendant had failed to establish, by affirmative proof, his lawful right to remain in the United States; and said Commissioner did find and adjudge said defendant to be unlawfully within the United States, and did order that said defendant be removed from the United States to China, it not appearing that he was subject or a citizen of any other country than China, and said defendant was committed to the custody of the United States Marshal for said District.

That thereafter, to-wit: on the 31st day of October, 1903, said defendant duly appealed from said findings, order and judgment of said Commissioner, to me, Francis J. Wing, United States District Judge.

That, on the 27th day of November, 1903, said cause, on appeal, as aforesaid, came on regularly for hearing before me, sitting as said Judge, whereupon the following proceedings were had:—

The said defendant objected and demurred, by his counsel, to the introduction of any testimony under the charge, on the ground that the Act on which the prosecution is based is unconstitutional and void, being in contravention of Article Three (3), Section Two (2) of the Constitution of the United States, and of Section Seven (7) of the Amendments to the same.

The objection and demurrer was thereupon sustained by the Judge, to which ruling the plaintiff, the United States of America, by its Attorney, then and there duly excepted.

The United States of America, Northern District of Ohio, eastern division, *ss.*

Before Francis J. Wing, U. S. District Judge.

THE UNITED STATES OF AMERICA, plaintiff, *v.* JOCK COE, DEFENDANT.	Opinion of Francis J. Wing, U. S. District Judge.

Section 13 of the Act of September 13, 1888, upon which this prosecution is based, provides that, upon the filing of an affidavit which charges that a person is a Chinese person, or person of Chinese descent, and that he is unlawfully in the country, a warrant may issue for the arrest of such person. Such process is operative not alone against Chinese persons, but against any person in the community, within the meaning of that word as used in the Constitution. Such person, under

the provisions of the Act, is then brought before a Commissioner, and tried upon the issues raised by the allegations of the affidavit. If found guilty, the Commissioner is empowered to make an order of deportation, the effect of which will be to remove such person to China.

In each of the causes which have been decided by the Supreme Court of the United States, under this Act, the record has shown that the person objecting to the constitutionality of the Act was admittedly a person of Chinese descent. The consideration which I have given to the Act is from the standpoint of those other than Chinese persons, who are entitled to the protections guaranteed by the Constitution, and who are the real objects of the inherent menace of prosecutions of this character.

While it may be readily understood that it rests within the sovereign power of the Government to exclude aliens, and prevent their entry into the country, and that such exclusion of an ascertained or admitted alien in no way violates any of the provisions of the Constitution, it is also easy to be recognized that, to arrest and put upon trial any person within the body of the country, by the process of affidavit and warrant, in the manner provided by the statute, upon the charge that such person is a prohibited alien, and therefore subject to the penalty of deportation,—which would be banishment if the person is a citizen,—is an encroachment upon such person's constitutional rights, unless it be assumed that the mere fact of arrest is conclusive proof that the person arrested is such prohibited alien.

I therefore hold that so much of the Act of September 13, 1888, as provides for arrest and trial

before a Commissioner, or on appeal to a Federal Judge, upon the filing of an affidavit, is unconstitutional, because the Act in no wise provides for those protections guaranteed by the Constitution to persons within the United States.

FRANCIS J. WING,
U. S. Dist. Judge, N. D. O.

Thereupon, counsel for the defendant herein moved for an order discharging the defendant, on the ground of the unconstitutionality of the Act, as aforesaid, which motion was thereupon granted by the Judge, and the said defendant was ordered discharged; to which ruling of the Judge granting said motion, and order discharging said defendant, the United States, by its Attorney, then and there duly excepted.

Thereupon the United States duly filed its motion for a new trial, which is a part of the record herein, for the reasons and upon the grounds in said motion stated, which motion was overruled by the Judge, to which ruling of the Judge the United States, by its Attorney, then and there duly excepted.

Thereafter, judgment accordingly was regularly entered herein, to which judgment the United States, by its Attorney, duly excepted.

And now, that the foregoing matters may be made a part of the record, the undersigned, Judge of said Court, at the request of the plaintiff, The United States of America, doth hereby allow, settle and sign, within the time allowed by law, the foregoing Bill of Exceptions, and orders the same to be filed.

FRANCIS J. WING,
United States District Judge.

[Indorsed.]

Before Francis J. Wing, U. S. district judge, Northern District of Ohio.

THE UNITED STATES OF AMERICA,
plaintiff,
v.
JOCK COE, DEFENDANT.

Bill of exceptions.

The United States of America, northern district of Ohio, eastern division.

Before the Hon. Francis J. Wing, U. S. district judge.

THE UNITED STATES OF AMERICA, plaintiff,
vs.
JOCK COE, DEFENDANT.
} No. 2982. Motion for new trial.

Now comes the plaintiff, the United States of America, by John J. Sullivan, United States Attorney, and asks that a new trial be granted on the following grounds and reasons, to-wit:

1. That the Judge erred in excluding evidence offered by the Government.

2. That the Judge erred in sustaining the objection and demurrer made by the defendant, to the introduction of any testimony under the charge, on the ground that the Act on which the prosecution is based is unconstitutional and void, being in contravention of Article 3, Section 2 of the Constitution of the United States, and Section 7 of the amendments to the same.

3. That the Judge erred in holding that so much of the Act of September 13, 1888, as provides for arrest and trial before a Commissioner, or on appeal to a Federal Judge, upon the filing of an affidavit is unconstitutional.

4. That the Judge erred in sustaining the motion to discharge the defendant, and in discharging the defendant.

5. That the judgment of discharge was contrary to law.

6. And for other errors apparent on the record.

JOHN J. SULLIVAN,
United States Attorney,
Northern District of Ohio.

[Indorsed.]

No. 2982.

The United States of America, northern district of Ohio, eastern division.

Before the Hon. Francis J. Wing, U. S. district judge.

THE UNITED STATES OF AMERICA, plaintiff,
vs.
JOCK COE, DEFENDANT.

Motion for new trial.

Filed Dec. 1, 1903, at —— o'clock —— m. H. F. Carleton, clerk.

John J. Sullivan, U. S. Attorney.

The United States of America, northern district of Ohio, eastern division, *ss:*

Before Francis J. Wing, U. S. district judge.

THE UNITED STATES OF AMERICA, plaintiff, *vs.* JOCK COE, DEFENDANT. } Petition for order.

Now comes the United States of America, by John J. Sullivan, United States Attorney, and asks for an order from this Honorable Judge, directing the Clerk of the District Court for the Northern District of Ohio, to file all the papers in this proceeding and make all necessary entries in regard thereto, in order that an appeal may be taken therein to the Supreme Court of the United States, and further directing said Clerk to make up and certify, as Clerk, a complete transcript of the record in this proceeding.

As reason for the granting of said petition it is respectfully represented:

1. That the Clerk of said Court now refuses to file said papers, or make a transcript of the record herein.

2. That it is necessary for the proper administration of justice and for the securing of a hearing of this proceeding in the Supreme Court of the United States, that a properly certified transcript of the proceedings already had, be made.

3. Attention is directed to the fact that four cases, in which the Supreme Court of the United States on Feb. 23, 1904, rendered its decisions, in cases similar to this proceeding, and in which said cases the Clerk of the District Court of the United

States of the Eastern District of New York, certified to the proceedings had in that Court and before the Judge thereof, in the manner in which it is now asked that the said Clerk be directed to act.

Copies of the transcript in those cases and also the opinion of the Supreme Court are herewith presented.

March 2, 1904

JOHN J. SULLIVAN,
United States Attorney,
Northern District of Ohio,
Attorney for Plaintiff.

The above motion is overruled to which ruling, the plaintiff the United States of America, excepts.

FRANCIS J. WING
U. S. District Judge of the
North. District of Ohio

O

FILE COPY

Supreme Court, U.S.
FILED
APR 13 1904
JAMES H. MCKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

EX PARTE THE UNITED STATES, PETITIONER.
NO. 16, ORIGINAL.

PETITION FOR A WRIT OF MANDAMUS.

BRIEF FOR PETITIONER.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

EX PARTE: THE UNITED STATES, PETITIONER.
NO. 16, ORIGINAL.

PETITION FOR A WRIT OF MANDAMUS.

BRIEF FOR PETITIONER.

I.

MANDAMUS THE PROPER REMEDY.

Judge Wing erroneously treated the appeals from the United States commissioner in the Chinese cases referred to as before him merely as *judge*. The purpose of this application is to compel him to take jurisdiction of such appeals as *district court*, enter final judgments therein, and file and record the papers and proceedings, in order that the Government may avail itself of its statutory right to a review thereof by this court.

In *Insurance Company* v. *Comstock* (16 Wall., 258) it was held that mandamus was the proper remedy to compel a circuit court, which had erroneously dismissed

a case appealed from a district court for want of jurisdiction, to take jurisdiction thereof and proceed to final judgment. The court there said (p. 270):

> Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate Federal court to decide a pending cause. (*Marbury* v. *Madison*, 1 Cranch., 175; *Kendall* v. *United States*, 12 Peters, 622.) Power to issue the writ of mandamus to the circuit courts is exercised by this court to compel the circuit court to proceed to a final judgment or decree in a cause, *in order that this court may exercise the jurisdiction of review given by law;* and in the case of *Ex parte Bradstreet* (7 Peters, 647) this court decided, Marshall, C. J., giving the opinion of the court, that every party has a right to the judgment of this court in a suit brought by him in one of the inferior courts of the United States, provided the matter in dispute exceeds the sum or value of $2,000, and that the court in such case will issue the writ to a circuit court or a district court exercising circuit court powers, in a case where the subordinate court had improperly dismissed the case, requiring the court to reinstate the case and to proceed to try and adjudge the issues between the parties.

In the case of *Ex parte Bradstreet*, referred to in the above quotation, the rule to show cause had been granted at a previous term. (6 Pet., 774.) The re-

porter having inquired of Mr. Justice Baldwin whether he dissented from the order of the court, the latter replied (6 Pet., 774, note):

> I dissented from the order of the court in the following respects: 1. In ordering the suits to be reinstated. 2. Requiring the court to permit amendments to be made.
>
> The ground of my dissent was that a mandamus was not a proper remedy; that the dismissal of a suit for want of jurisdiction was a final judgment, on which a writ of error could be brought, but that the Supreme Court had no power to issue a mandamus in such a case, the judgment being strictly a judicial act, and that though an appellate court could direct amendments, it could only do so when a case was before them by writ of error or appeal.
>
> It was stated in the affidavit that the court had actually rendered a judgment of dismissal for the want of jurisdiction, *but that there was no entry of it on the record, and that the judge had neglected or refused an application to direct it to be done.* I had no doubt that this was a proper case for a rule to show cause why a mandamus should not issue, directing the entry of such judgment as had been rendered by the court, so as to give the plaintiff the benefit of a writ of error.

In *Railroad Company* v. *Wiswall* (23 Wall., 507), where a circuit court of the United States had remanded, for want of jurisdiction, a case removed into it from a State court, it was held that the proper remedy was not by writ of error to review what had been

done, but by mandamus "to compel action"—that is, to make the circuit court take jurisdiction.

Recent cases to the effect that mandamus is the proper remedy to compel a court which is under the appellate jurisdiction of this court to take jurisdiction of a case, where it has erroneously declined to do so, and render final judgment therein, are—

In re Grossmayer (177 U. S., 48).
In re Connaway (178 U. S., 421).

It is true, as stated in the return of Judge Wing, that he did allow an appeal, or rather what was designated as a writ of error, to this court. But the writ so allowed goes to his action as *judge* only, and is regarded by the Government as of no consequence, since there is no right of review by this court of the action of a judge at chambers in such cases. The application for the allowance of that writ, it may be stated, was made by the United States attorney without the advice or direction of the Department.

It was thought unnecessary to set out these papers in the petition. But since the fact of the allowance of an appeal is mentioned in the return of the judge, they are appended hereto in order that the court may see just what was done.

If any value is to be given to the so-called writ of error allowed by Judge Wing, it must be upon the theory that the writ goes to his action as district court, notwithstanding his omission from the writ of the usual phrase indicating that the plea to be reviewed was before him in said court. In that event, however,

mandamus would still be necessary to compel him to enter final judgment on the records of the court, and file and record the papers and proceedings, in order that a record may exist for certification by the clerk to this court. The bill of exceptions which he signed of the proceedings before him as judge would not be sufficient, since it has not been filed, nor will he permit it to be filed, as a part of the records of the court.

II.

AS TO THE CONSTRUCTION OF THE STATUTE.

The act of September 13, 1888 (25 Stat., 476), provides:

> SEC. 13. That any Chinese person or person of Chinese descent found unlawfully in the United States or its Territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted upon a hearing and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came.
>
> *But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district.*

Ever since the passage of this act, until quite recently, it has been understood that the appeal from

the decision of a United States commissioner provided by the act of 1888 was to the district court and not merely to the judge. The question was so decided as early as 1892 by the circuit court of appeals for the ninth circuit. (*United States* v. *Gee Lee*, 50 Fed., 271.) The court there said:

> Section 13 of the act of 1888 contains this clause: "But any such Chinese person, convicted before a commissioner of a United States court, may, within ten days from such conviction, appeal to the judge of the district court for the district."
>
> No express provision is made for an appeal from the judgment of the district judge in such a case.
>
> Section 6 of the act of 1891, creating this court, provides that it "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court * * * in all cases other than those provided for in the preceding section" of the act.
>
> If, under the circumstances, the words "the judge of the district court for the district" can be held equivalent to the words "the district court for the district," a writ of error will lie from this court to review the judgment.
>
> We are of opinion that the statute should be so read. The learned judge of the district court, from the allowance by him of the writ of error, evidently so thought. *Every argument of convenience and utility favors this conclusion. Uniformity of decision in a very important matter will thus be secured.*

> "Judge of the district court" and "district court" are not, strictly speaking, convertible terms. But they are so in a popular sense, and it is safe to assume that Congress, in the use of the former phrase in this connection, intended to give the party an appeal to the district court of the District.

It was not until 1901 that the other view was judicially expressed. (See opinion of the court of appeals for the first circuit in *Chow Loy* v. *United States*, 112 Fed., 354.)

This court has entertained, without question, appeals from district courts of the United States in Chinese cases appealed to those courts from United States commissioners, which, of course, could only have been upon the theory that the statute provided for appeals to the district court.

In *United States* v. *Mrs. Gue Lim* (176 U. S., 459) this court entertained jurisdiction of several distinct appeals from the district court for the district of Washington. In the case of Mrs. Gue Lim the warrant had been issued and her discharge ordered by the district court. In the other cases the proceedings were had before a United States commissioner, and from his judgment of deportation an appeal was taken to the district court, which reversed his decision. The judgments of the district court were all affirmed by this court.

In *Chin Bak Kan* v. *United States*, Mr. Chief Justice Fuller, speaking for the court, said (186 U. S., 199–201):

> Something is said in respect of want of jurisdiction in the commissioner because section 6

of the act of 1892 provides that Chinese laborers without certificates may be "taken before a United States judge;" but we concur in the views of the circuit court of appeals for the ninth circuit in *Fong Mey Yuk* v. *United States* (113 Fed. Rep., 898), that the act is satisfied by proceeding before "a justice, judge, or commissioner." These are the words used in section 12 of the act of 1882, section 12 of the act of 1884, *section 13 of the act of 1888*, and section 3 of the act of 1892, while the first section of the act of March 3, 1901, explicitly authorizes the district attorney to designate the commissioner before whom the Chinese person may be brought. The words "United States judge," "judge," and "court," in section 6, seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or a commissioner. A United States commissioner is a *quasi* judicial officer, and in these hearings he acts judicially. *Moreover, this case was taken by appeal from the commissioner to the judge of the district court*, and his decision was affirmed, *so that there was an adjudication by a United States judge* in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute.

* * * * *

Section 13 of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath "by any justice, judge, or commissioner of any United States court," and when convicted, on a hearing, and

> found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. "But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

In this case, it will be observed, the attention of the court was directly fixed upon the provision in section 13 of the act of 1888 authorizing an appeal from a commissioner to the "judge of the district court." As the court must have had in mind the fact that that was an appeal from the district court, the only reasonable deduction to be made from the language italicized is that the court understood the appeal given by the statute was to the district court.

The recent cases of *Ah How et al.* v. *United States*, Nos. 307, 308, 309, and 312, and *Tom Hong et al.* v. *United States*, Nos. 310, 311, and 313, decided March 21 and February 23, 1904, respectively, were also appeals from a *district court*, to which the cases had been brought upon appeal from a United States commissioner. In those cases the jurisdiction of this court was directly questioned by the Government, it being argued that but one appeal was intended to be given by the statute; and the attention of the court was called to the conflicting decisions of the circuit courts of appeals for the ninth and first circuits in *United States* v. *Gee Lee* (50 Fed., 271) and *Chow Loy* v. *United States* (112 Fed., 354) upon the question whether the

appeal was to the district judge or the district court. This court, however, took jurisdiction and affirmed the judgments of the district court in the first group of cases, but *reversed the judgments* of the district court *and discharged the appellants* in the second group. (See "Motions on behalf of the United States to vacate orders admitting to bail; and to dismiss or affirm the appeals," pp. 23–26.)

It must be assumed, therefore, that the question under discussion has been passed upon by this court. The question of jurisdiction, as the court has said, whether directly raised or not, is always before it; and upon a question of jurisdiction the first inquiry, as the court has also said, is the jurisdiction of the lower court. In the cases just referred to, where it was distinctly raised, the lower court would not have had jurisdiction if the appeal from the commissioner was to the judge individually and not to him as district court.

We have just been advised that on April 4, 1904, the circuit court of appeals for the ninth circuit overruled motions to dismiss made by the Government in certain Chinese cases (*Tsoi Yii and others* v. *United States*) appealed thereto from the district court for the northern district of California, the cases having come to the district court on appeal from judgments of deportation rendered by a United States commissioner. The ground of those motions was that the appeal from the commissioner, under the statute, was to the judge and not to the district court, and therefore no appeal

lay from his decision. The circuit court of appeals, after showing wherein the reasoning of the circuit court of appeals for the first circuit in *Chow Loy* v. *United States* (112 Fed., 354) was defective, held that the action of this court in taking jurisdiction of the appeals from the district courts in the cases above cited determined the fact that the appeal from the commissioner was to the district court, and was therefore conclusive of their right to entertain the appeals before them. As the case is not yet reported, a copy of their opinion is hereto appended.

No argument of hardship or inconvenience can be made against this construction of the act of 1888. The Chinese persons concerned certainly can not object, since it affords them opportunity, not only of a rehearing, if the decision of the district court is adverse, but if in their favor, to obtain a judicial record, for their future protection, of the fact that they are lawfully entitled to remain in the United States. The necessity on their part for such a record is apparent. In this respect the situation differs from that of a proceeding for habeas corpus before a judge, since his denial of the writ does not bar further proceedings of the same nature.

The interest of the Government in the maintenance of the existing practice is also manifest. To the numerous adjudications of this court that the method of Chinese exclusion which Congress has seen fit to adopt for the protection of the people of the United States is constitutional, Judge Wing has seen fit to oppose

his individual judgment, with the result that the administration of the law will be nullified in the northern district of Ohio, unless his action can be controlled by this tribunal. Similar conditions may possibly arise in other districts.

The proposition, then, amounts to this: Shall the practical construction of the act of 1888, as to appeals from United States commissioners, inaugurated and judicially sanctioned from the passage of the act, and recognized by this court, and which is to the interest of all concerned, now, sixteen years later, be overthrown, in favor simply of a more literal reading of the statute?

HENRY M. HOYT.
Solicitor-General.
J. C. MCREYNOLDS,
Assistant Attorney-General.

WASHINGTON, *April, 1904.*

APPENDIX.

THE UNITED STATES OF AMERICA,

Northern district of Ohio, eastern division, ss:

Before Francis J. Wing, United States district judge.

THE UNITED STATES OF AMERICA, plaintiff, *v.* JOCK COE, DEFENDANT.	Petition for writ of error.

Now comes the United States of America, plaintiff herein, and says that on or about the 27th day of November, 1903, Francis J. Wing, United States district judge, entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in its behalf to the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the records, proceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

JOHN J. SULLIVAN,
United States Attorney, Northern District of Ohio.

[Indorsed.]

Before Francis J. Wing, United States district judge, northern district of Ohio. The United States of America, plaintiff, *v.* Jock Coe, defendant. Petition for writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the northern district of Ohio, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is before you, between the United States of America, plaintiff in error, and Jock Coe, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears, and it being duly fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, on the —— day of ———, 1904, in said Supreme Court of the United States, to be there and then held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 3d day of February, 1904.

FRANCIS J. WING,
Judge of the District Court of the United States for the Northern District of Ohio.

The above writ of error is hereby allowed.

FRANCIS J. WING,
Judge of the United States District Court.

[Indorsed.]

Before Francis J. Wing, United States district judge, northern district of Ohio. The United States of America, plaintiff in error, *v.* Jock Coe, defendant in error. Writ of error.

In the United States circuit court of appeals for the ninth circuit.

TSOI YII
v.
THE UNITED STATES OF AMERICA.

YEE YUEN
v.
THE UNITED STATES OF AMERICA.

CHEUNG HIM NIM
v.
THE UNITED STATES OF AMERICA.

CHEW HING
v.
THE UNITED STATES OF AMERICA.

LEE YUE
v.
THE UNITED STATES OF AMERICA.

CHIN CHEW FONG
v.
THE UNITED STATES OF AMERICA.

C. T. Hughes, Frank V. Bell, and Henry C. Dibble & Dibble, for the appellants.

Duncan E. McKinlay for the appellee.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

The appellants in these cases, Chinese persons, were prosecuted before a United States commissioner under section 13, of the Chinese-exclusion act of September 13, 1888. The commissioner in each case adjudged

that they were unlawfully in the United States and that they be deported. Appeals from his judgments were taken to the judge of the district court for the northern district of California. Judgments were made and entered in that court affirming the judgments of the commissioner. From the judgments of the district court appeals were taken to this court. The appellee now moves to dismiss on the ground that no appeal lies from the decision of the district judge. Section 13 of the act of September 13, 1888, under which the appeals were taken provides as follows:

> That any Chinese person, or persons of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any person on behalf of the United States, by any justice, judge, or commissioner of a United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted upon a hearing and found and adjudged to be not lawfully entitled to be and remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district.

It is contended that all legislation relating to the Chinese is special, that the section above quoted gives the right of appeal only from the ruling of a commissioner to the judge of the district court, and that the decision of such district judge is not the judgment of the court and is not a final decision appealable to this court, such as is contemplated by section 6 of the act

of March 3, 1891, establishing the circuit court of appeals and providing that they shall exercise appellate jurisdiction to review by appeal, or writ of error, final decision in the district court. In the case of *United States* v. *Gee Lee* (50 Fed., 271) the phrase "the district judge of the district" as used in section 13 of the act of September 13, 1888, was construed and was held to be the equivalent of the words "district court of the district." Judge Deady, who delivered the opinion of the court in that case, said: "'Judge of the district court' and 'district court' are not, strictly speaking, convertible terms. But they are so in a popular sense, and it is safe to assume that Congress, in the use of the former phrase, in this connection, intended to give the party an appeal to the district court of the district." In *Chow Loy* v. *The United States* (112 Fed., 354) the circuit court of appeals for the first circuit criticised the decision in the Gee Lee case, and held that the appeal to the judge of the district court for the district is to the judge as a special tribunal and not to the district court. In support of this view the court referred to the decision in *Fong Yue Ting* v. *The United States* (149 U. S., 698, 728), where it was said: "The designation of the judge in general terms as a United States judge is an apt and sufficient description of a judge of a court of the United States, and is equivalent to or synonymous with the designation, in other statutes, of the judges authorized to issue writs of habeas corpus or warrants to arrest persons accused of crime, Rev. St., 752, 1014," and the circuit court of appeals, arguendo, referred to *Carper* v. *Fitzgerald* (121 U. S., 87), where it was held that no appeal lies in the Supreme Court from the order of a circuit judge made in chambers as a judge and not as a court, discharging a person brought before him on a writ of

habeas corpus. But in the case of Fong Yue Ting, the remarks of the court above quoted were not directed to the provision of the act providing for an appeal to the district judge from a commissioner's decision. They had reference to the language of section 6 of the act of May 5, 1898, and the portion thereof which provides that a Chinese laborer who shall neglect or fail to apply for a certificate of residence within the year therein prescribed "may be arrested by any customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge," and that it shall thereupon be the duty of a judge to order that the laborer be deported from the United States.

We think the whole question of our right to entertain these appeals is determined by the decisions of the Supreme Court in *United States* v. *Mrs. Gue Lim* (176 U. S., 459), *Chin Bak Kan* v. *United States* (186 U. S., 193), and *Ah How* v. *United States*, and the other cases therewith decided on February 23, 1904, not yet reported. In the first of those cases certain Chinese had by the United States commissioner been adjudged to be unlawfully within the United States. They appealed and the district court held that they were lawfully entitled to be and remain in the United States. An appeal was taken to the Supreme Court, and that court affirmed the judgment of the district court. In the Chin Bak Kan case the appellant was arrested under the provisions of section 12 of the act of September 13, 1888, and was by a commissioner adjudged to be unlawfully in the United States and ordered to be deported. An appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the district court of the United States for the northern district of New

York. That court affirmed the judgment. From that judgment an appeal was taken to the Supreme Court under section 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn into question. The Supreme Court entertained the appeal and its opinion affirming the judgment appealed from, quoted the provisions of section 13 of the act of September 13, 1888, under which the arrest was made. The case of Ah How was a similar one. Mr. Justice Holmes, in delivering the opinion of the court, said: "These are appeals of a commissioner, and adjudging that the appellants be removed from the United States to China," and the court affirmed the judgments of the district court.

If appeals could be taken in those cases to the Supreme Court, they could be entertained only on the ground that the decision of the district judge on an appeal from the commissioner's decision was the judgment of the district court, and as such a final decision from which an appeal could be taken. It is true that in neither of those decisions was discussion had of that precise question, but it is not supposed that the Supreme Court did not consider all the terms of the act authorizing the judgment from which the appeal was prosecuted, and did not have in mind and pass upon the question of its own jurisdiction. On the authority of those decisions the motions to dismiss will be overruled.

[Indorsed.]

Opinion overruling motions to dismiss. Filed April 4, 1904. F. D. Monckton, clerk.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 16, Original.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

ANSWER OF FRANCIS J. WING, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED APRIL 2, 1904.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 16, Original.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

ANSWER OF FRANCIS J. WING, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 In the Supreme Court of the United States.

October Term, 1903.

No. 16. Original.

EX PARTE THE UNITED STATES, PETITIONER.

ANSWER OF FRANCIS J. WING, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Now comes Francis J. Wing, and, in obedience to the rule to show cause entered herein, respectfully represents as follows:

1. That he is now, and was at the times stated in the petition for mandamus filed herein, judge of the district court of the United States for the northern district of Ohio.

2. That, in the case of the United States versus Jock Coe, proceedings occurred as set down and described in the bill of exceptions therein, a copy of which is attached to the petition for mandamus herein as an exhibit, and not otherwise.

That a petition for an order was presented to your respondent by the United States attorney in said cause, as of March 2, 1904, praying that your respondent, as judge, should direct the clerk of the district court for the northern district of Ohio "to file all the papers in this proceeding and make all necessary entries in regard thereto, in order that an

appeal may be taken therein to the Supreme Court of the United
2 States, and further directing said clerk to make up and certify, as clerk, a complete transcript of the record in this proceeding," a copy of which petition is attached to the petition herein as an exhibit. The said petition was denied by your respondent, as judge, to which ruling exception was taken by the United States.

Upon the application of the United States attorney, your respondent allowed an appeal of said cause to the Supreme Court of the United States, and signed such allowance and delivered the same to the United States attorney.

The causes which moved your respondent to the course adopted were the judicial interpretation of your respondent of the language in section 13 of the act of September 13, 1888, which provides for an appeal "to the judge of the district court for the district," to the effect that such language gave jurisdiction in appeal to your respondent, as judge, and did not give jurisdiction to the United States district court of this district to hear such appeal, and that such appeal was heard, not in the district court, but before your respondent, as judge thereof; and the decision in Carper v. Fitzgerald, 121 U. S., 87, to the effect that neither the form of the docket entry nor the recording of the proceedings in the records of the court could change the character of the proceedings.

Your respondent further held, in his discretion as judge, that the clerk of the United States district court for the district should not be ordered to make the proceedings in said cause of The United States v. Jock
3 Coe a matter of record in the United States district court, because there is no provision of law which requires such clerk to record other proceedings than those which occur in the United States district court.

3. As to the second paragraph of the petition herein, it is true, as stated therein, that a person was arrested, upon a warrant issued by John H. Simpson, United States commissioner, under the name of Bong Meng. As to whether or not he was a Chinese person, as alleged in the petition, your respondent has no knowledge; and, for want of knowledge, denies the allegation that Bong Meng was a Chinese person.

Proceedings with respect to the person called Bong Meng were had before your respondent, in all respects similar to those with respect to Jock Coe.

4. On January 16, 1904, a person was brought before your respondent, on appeal, under the name of Woo Joe. As to whether or not he was a Chinese person, as alleged in the petition, your respondent has no knowledge; and, for want of knowledge, denies the allegation that the person arrested was a Chinese person.

Proceedings with respect to the person called Woo Joe were had before me, in all respects similar to those described with respect to Jock Coe and Bong Meng.

FRANCIS J. WING,
Judge of the United States District Court
for the Northern District of Ohio.

THE STATE OF OHIO, *Cuyahoga County, ss:*

Personally appeared before me Francis J. Wing, judge of the district court of the United States for the northern district of Ohio, who,
4 being duly sworn, deposes and says that he has read the foregoing answer, and knows the contents thereof, and that the statements therein are true, to the best of his knowledge, information, and belief.

FRANCIS J. WING.

Sworn to before me the said Francis J. Wing, and by him subscribed in my presence, this thirty-first day of March, A. D. 1904.

[SEAL.]

CHAS. M. BUSS,
Notary Public, Cuyahoga County, Ohio.

(Indorsed:) United States Supreme Court. October term, 1903. No. 16. Original. Ex parte The United States, Petitioner. Answer of Francis J. Wing, judge of U. S. district court northern district of Ohio. Received office of the clerk Supreme Court U. S. Apr. 2, 1904.

(Indorsement on cover:) Supreme Court U. S., October term, 1903. Term No. 16, origl. Ex parte, in the matter of The United States vs. Petitioner. Answer of Francis J. Wing, judge of U. S. dist. court northern district of Ohio. Filed April 2d, 1904.

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FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 16, Original.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

ANSWER OF H. F. CARLETON, CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

FILED APRIL 2, 1904.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 16, Original.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONER.

ANSWER OF H. F. CARLETON, CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

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1 In the Supreme Court of the United States. October term, 1903.
No. 16, original.

EX PARTE THE UNITED STATES, PETITIONER.

ANSWER OF H. F. CARLETON, CLERK OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO.

Now comes H. F. Carleton, and in obedience to the rule to show cause entered herein respectfully represents as follows:

1. That he is nov, and was at the times stated in the petition for mandamus filed heren, clerk of the district court of the United States for the northern district of Ohio.

2. That in the cases of The United States versus Jock Coe. The United States versus Bong Meng, and The United States versus Woo Joe, he has omitted to make record of the doings and proceedings in said causes because of the decisin of the judge of the district court for the district to the effect that all of such proceedings were had before him as judge, and that such proceedings were not had in the United States district court; and because tiere is no authority of law for your respondent, as clerk of said court, to enter upon its records other matter than that which records the proceedings of the United States district court, without the order of the Cout.

H. F. CARLETON,
Clerk U. S. Dist. Court, N. D. O.

2 THE STATE OF OHIO,
Cuyahoga County, ss:

Personally appeared before me, H. F. Carleton, clerk of the district court of the United States for the northern district of Ohio, who, being duly sworn, deposes and says that he has read the foregoing answer, and knows the contents thereof, and that the statements therein are true, to the best of his knowledge, information, and belief.

H. F. CARLETON.

Sworn to before me by the said H. F. Carleton, and by him subscribed in my presence, this thirty-first day of March, A. D. 1904.

[SEAL.] CHAS. M. BUSS,
Notary Public, Cuyahoga County, Ohio.

3 (Indorsed:) United States Supreme Court. October term, 1903. No. 16, original. Ex parte The United States, petitioner. Answer of H. F. Carleton, clerk of U. S. district court, northern district of Ohio. Received office of the clerk Supreme Court U. S., Apr. 2, 1904.

4 (Indorsement on cover:) Supreme Court U. S. October term, 1903. Term No., 16, orig'l. Ex parte In the matter of the United States vs. Petitioner. Answer of H. F. Carleton, clerk U. S. district court northern dist. of Ohio. Filed April 2d, 1904.

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Supreme Court of the United States.

No. 16, Original.—October Term, 1903.

In re The United States, Petitioner.

[May 2, 1904.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

This is a petition for a writ of mandamus, commanding the judge of the District Court of the United States for the Northern District of Ohio to direct the entry on the records of that court of final judgment in the cases of *The United States* v. *Jock Coe*, *Bong Meng*, and *Woo Joe*, and that the clerk enter the same; and that the cases be treated as properly appealed from the United States commissioner before whom they had been heard in the first instance and as having been before the District Court for determination. The complaint against Coe was made before a United States commissioner for the Northern District of Ohio, charging that Coe, a Chinese person, was within the United States at Cleveland, Ohio, contrary to law, and a warrant was duly issued and executed, whereupon the commissioner found Coe guilty and ordered him to be deported. Coe appealed "to the District Court of the United States in and for the Northern District of Ohio, and the judge of said court," and the commissioner transmitted a copy of the proceedings before him and the accompanying papers "into the District Court of the United States," as his certificate stated. The transcript was filed by the clerk of the District Court and was marked as filed among the papers pertaining to the case. Subsequently a hearing was had and section thirteen of the act of Congress of September 13, 1888, was held to be unconstitutional, and Coe was discharged, to which exception was taken. Motion for new trial was made and overruled, and a bill of exceptions was duly settled and signed by the District Judge. The United States applied to the clerk to file the bill of exceptions and various papers as part of the record of the District Court, and to prepare a certified transcript thereof; but the clerk declined to do this under instruction of the judge, and furthermore stated that so many of the papers as were marked filed "had been so marked by mistake." The United States thereupon requested the judge in writing to order the clerk to file in the District Court all the papers in the proceedings and to make the necessary entries in regard thereto, and to prepare a certified transcript thereof, in order that a complete record of the same might be preserved,

to be used on an appeal taken to this court. The request was refused on the ground that the proceedings on appeal from the commissioner had been had before the judge as judge and not before the District Court.

Leave having been granted to file the petition and a rule having been entered thereon, return thereto has been duly made. The return of the judge states that in the proceedings against Coe, which were described in the bill of exceptions, a copy of which was attached to the petition for mandamus as an exhibit, he had denied as judge the order applied for, although he had allowed an appeal of the cause to the Supreme Court of the United States; that he had adopted this course because he was of opinion that section thirteen gave jurisdiction on appeal to respondent as judge, but did not give jurisdiction to the District Court to hear such appeal; and that said appeal was heard by respondent as judge and not in the District Court; that the clerk should not be ordered to make the proceedings matter of record in the District Court because there was no provision of law requiring the clerk to record proceedings other than those occurring in the court.

It seems that the judge allowed a writ of error, but only to his action as judge, and even if it could be held to run to the District Court, it would be equally unavailing in the absence of final judgment in that court and of the filing of the bill of exceptions. As we understand this record, if the appeal from the commissioner under section 13 was an appeal to the District Court, then it follows that the commissioner's transcript and other papers pertaining to the case should be filed and the judgment be entered in that court, and an appeal will bring the cause before us. In other words, the District Court will not have lost jurisdiction because of the view taken by the District Judge, and the final order may be entered as the final judgment of the court.

Section 13 of the act of September 13, 1888, (25 Stat. 476, c. 1015,) provides: "That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of the United States Court, or before any United States court, and when convicted upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district."

Many cases may be found in which the words "Court" and "Judge" were held to have been used interchangeably, and in *Foote* v. *Silsby*, 1

Blatchf. 542, Mr. Justice Nelson was of opinion that the Circuit Judge sitting at chambers was the Circuit Court in the usual and proper sense of the term and within the meaning of the seventeenth section of the Patent Act of July 4, 1836, 5 Stat. 117, c. 357.

In *Porter* ads. *United States*, 2 Paine, 313, Judge Betts said: "It is not an unusual use of language, in the statutes, to put the judge for the court, and to make provisions for him to execute which can only be executed in court." It was held that a statute authorizing a party "to prefer a bill of complaint to any District Judge of the United States," referred to the District Court and not to the judge as an individual.

The construction put upon section thirteen in practice has been quite general that the appeal to the District Judge is in effect an appeal to the District Court.

In 1892 the Circuit Court of Appeals for the Ninth Circuit so held, in *United States* v. *Gee Lee*, 50 Fed. Rep. 271, and that the Circuit Court of Appeals had jurisdiction over the judgment of the District Court under section six of the judiciary act of March 3, 1891. The Circuit Court of Appeals was of opinion that the words "the judge of the District Court for the district" could and should be held equivalent to the words "the District Court for the district," and that, while they were not, strictly speaking, convertible terms, they were so in a popular sense; "and it is safe to assume that Congress, in the use of the former phrase in this section, intended to give the party an appeal to the District Court of the District."

In *United States* v. *Pin Kwan*, 109 Fed. Rep. 609, decided February 28, 1900, the Circuit Court of Appeals for the Second Circuit sustained a writ of error to review the decision of the District Court, (94 Fed. Rep. 824,) in which an order of deportation by a United States commissioner had been reversed by the District Court. Of course the Circuit Court of Appeals took jurisdiction on the theory that the statute provided for appeals from the commissioner to the District Court. And see *United States* v. *Ham Toy*, 120 Fed. Rep. 1022.

A different view was expressed by the Circuit Court of the First Circuit in the case of *Chow Loy*, 110 Fed. Rep. 952, in September, 1901, a proceeding in *habeas corpus*, and in the same case on appeal in the succeeding November, 112 Fed. Rep. 354; and the original ruling was reiterated by the Circuit Court of Appeals for the Ninth Circuit in *Tsoi Yii* v. *United States*, April 4, 1904, not yet reported, in which the case of Chow Loy was considered.

In *United States* v. *Mrs. Gue Lim*, 176 U. S. 459, decided February 26, 1900, this court entertained jurisdiction of several distinct appeals from the District Court for the District of Washington. In the case of Mrs. Gue Lim a warrant had been issued and her discharge ordered by the

District Court, but in the other cases the proceedings were had before a United States commissioner, and from his judgment of deportation the cases had been taken to the District Court, which reversed his decision. The judgments of the District Court were affirmed by this court.

By the first section of the act of April 29, 1902, (32 Stat. 176, c. 641,) section 13 of the act of 1888 was, together with some other sections, re-enacted and we think it not unreasonable to conclude that Congress accepted the view we had indicated, and by its action removed any doubt on the question.

Shortly after the approval of that act, in *Chin Bak Kan* v. *United States*, 186 U. S. 193, we took jurisdiction of an appeal from the judgment of the District Court for deportation on an appeal from the United States commissioner to the District Court of the United States for the Northern District of New York, and we observed: "Something is said in respect of want of jurisdiction in the commissioner because section six of the act of 1892 provides that Chinese laborers without certificates may be 'taken before a United States judge;' but we concur in the views of the Circuit Court of Appeals for the Ninth Circuit in *Fong Mey Yuk* v. *United States*, 113 Fed. Rep. 898, that the act is satisfied by proceeding before 'a justice, judge, or commissioner.' These are the words used in section twelve of the act of 1882; section twelve of the act of 1884; section thirteen of the act of 1888; and section three of the act of 1892; while the first section of the act of March 3, 1901, explicitly authorizes the District Attorney to designate the commissioner before whom the Chinese person may be brought. The words 'United States judge,' 'judge' and 'court,' in section six, seem to us to refer to the tribunal authorized to deal with the subject, whether composed of a justice, a judge, or a commissioner. A United States commissioner is a quasi-judicial officer, and in these hearings he acts judicially. Moreover, this case was taken by appeal from the commissioner to the judge of the District Court, and his decision was affirmed, so that there was an adjudication by a United States judge in the constitutional sense as well as by the commissioner acting as a judge in the sense of the statute." . . . "Section thirteen of the act of September 13, 1888, provides that any Chinese person, or person of Chinese descent, found unlawfully in the United States, may be arrested on a warrant issued upon a complaint under oath, 'by any justice, judge, or commissioner of any United States court,' and when convicted, on a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, shall be removed to the country whence he came. 'But any such Chinese person convicted before a commissioner of the United States court may, within ten days from such conviction, appeal to the judge of the District Court for the district.' It seems to have been assumed, during the years following the date of the act, and is conceded by the United States, that although most of its provisions were dependent

upon the ratification of the treaty of March 12, 1888, and failed with the failure of ratification, that this section is in and of itself independent legislation and in force as such. Accordingly in this case an appeal was taken from the judgment of deportation rendered by the commissioner to the judge of the District Court of the United States for the Northern District of New York, and, upon hearing, the District Court affirmed that judgment. From the judgment of the District Court, this appeal was taken under section five of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 was drawn in question."

In the cases of *Ah How et al.* v. *United States* and *Tom Hong et al.* v. *United States*, decided at this term, we disposed of sundry appeals from a District Court to which the cases had been brought on appeal from a United States commissioner. Our jurisdiction was directly challenged by the government and attention was called to the conflicting decisions of the Circuit Courts of Appeals for the Ninth Circuit in *United States* v. *Gee Lee*, and for the First Circuit in *Chow Loy* v. *United States*, on the question whether the appeal was to the District Judge or to the District Court, but we maintained jurisdiction and affirmed the judgments of the District Court in some of the cases, and reversed the judgments and discharged the appellants in others. In these cases the District Court would not have had jurisdiction if the statute confined appeals from the commissioner to appeals to the judge individually.

While it must be admitted that the proper construction of section 13 is not free from difficulty, we are not willing to change the construction we have heretofore repeatedly recognized as correct, and which we think has been adopted by Congressional legislation. That construction enables uniformity in the administration of the laws on this important subject to be attained by securing uniformity in judicial decision, and operates as a safeguard against injustice.

We assume that the other two cases are in substance the same as that of Coe.

The result is that we hold that the relief sought should be granted, but as we do not doubt it will be accorded on the expression of our conclusion, the order will be

Petitioner entitled to mandamus as prayed.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE